Supreme Court, U.S.
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No. _____

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In The Supreme Court Of The United States

OCTOBER TERM 1996

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as OFFICER OF WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually and in his capacity as OFFICER FOR FAYETTE CITY BOROUGH; OFFICER DARHL SNYDER, individually and in his capacity as OFFICER FOR NORTH BELLE VERNON BOROUGH,

Petitioners,

v.

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals exceed the mandate of Town of Newton v. Rumery in holding that "the public interest" prevents enforcement of a criminal defendant's covenant not to sue police officers and their municipal employers for alleged deprivation of civil or constitutional rights, entered in exchange for a prosecutor's agreement to permit the entry of judgment of acquittal in favor of the criminal defendant, unless before concluding the agreement, the prosecutor determined that the criminal defendant's civil rights claims against police or other prosecuting authorities were marginal or frivolous?

II. Where defendants have proved by a preponderance of the evidence that plaintiffs voluntarily entered into a judicially supervised release/dismissal agreement, have defendants established plaintiffs' valid, enforceable release of civil liability?

III. Does the Court of Appeals' holding, that the party seeking to enforce a judicially supervised release/dismissal agreement in a civil action must discharge its burden of proof by "clear and convincing" evidence, conflict with this Court's precedent?

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 91 F.3d 515 and appears at Appendix 1A-50A. The opinion of the United States District Court for the Western District of Pennsylvania is not reported, and appears at Appendix 52A-59A. The Court of Appeals for the Third Circuit in banc previously considered this case; its decision is reported at 12 F.2d 1205, and appears at Appendix 77A-98A. Additional unreported opinions of the District Court, and relevant Reports and Recommendations filed by Magistrate Judges, appear in reverse chronological order in the Appendix, at 60A-75A and 99A-109A.

STATEMENT OF JURISDICTION

Petitioners seek this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered July 31, 1996. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents filed suit against Petitioners under the provisions of 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

> the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents claimed violations of the Fourth and Fourteenth Amendments to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, and against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 14, 1991, Respondents Frances and Joseph Livingstone filed suit in the United States District Court for the Western District of Pennsylvania, invoking the District Court's jurisdiction under 28 U.S.C. §1343.

Respondents sought damages for injuries allegedly sustained by Frances Livingstone on January 12, 1989 during a confrontation in her home with police officers.

On that night, the Livingstones' daughter Carrie reported to Petitioner Frank Monack, a Washington Township, Pennsylvania police officer, that her father had struck her and that her parents were holding her son at the home she shared with them, without her consent. Officer Monack requested assistance under an intermunicipal police cooperation agreement; Petitioners Dahrl Snyder, a North Belle Vernon Borough police officer and Raymond Moody, a Fayette City Borough officer, responded to his call.

The witnesses agreed that Officer Monack and Snyder entered the home, to which Carrie had returned, to retrieve the the child. Mrs. Livingstone retreated to a bedroom with the child; she ignored the officers' directions to come out and she locked the door. Officer Monack picked the lock, and when he opened the door, Mrs. Livingstone struck him with a metal object, and barricaded the door with furniture. The officers did enter the room, and attempted to restrain Mrs. Livingstone, while she struggled violently. Ultimately, they carried her from the house, but she was not taken into custody that night.

Within hours of the incident, petitioner Monack filed a criminal complaint against Frances Livingstone, charging disorderly conduct, assault, terroristic threats, resisting arrest and interference with the custody of children. She was held for court on charges of disorderly conduct, resisting arrest, simple assault and interference with the custody of children, but she was not incarcerated pending trial.

Before her criminal trial began, Mrs. Livingstone spoke with a number of attorneys, including the director of the American Civil Liberties Union's Pittsburgh chapter, about the possibility of filing suit against the officers. She

also complained to public officials, seeking to pursue charges against one or more of the officers. The Federal Bureau of Investigation conducted an investigation and submitted a report to the United States Department of Justice, Civil Rights Division. Division attorneys informed Mrs. Livingstone, shortly before her criminal trial commenced, that no "prosecutable violation" of criminal civil rights statutes had occurred. (No.92-3288: 2171a)[1]

Mrs. Livingstone proceeded to trial in the Court of Common Pleas of Fayette County, Pennsylvania. She was represented by Thomas R. Ceraso, Esquire, who had been in practice for 35 years, specializing in criminal work. He testified that he had been involved in the defense of about three dozen criminal cases that were resolved by the negotiation of release/dismissal agreements. After the Commonwealth rested its case, the court granted defense counsel's demurrer to the charge of interference with custody of children, but denied the motion on the remaining charges. The defense then offered the testimony of Respondent Joseph Livingstone, and cross-examination of the second defense witness was under way when proceedings ended for the second day.

Before testimony resumed, the parties reached an agreement: Mrs. Livingstone's counsel would move for judgment of acquittal, without opposition from the prosecutor, and Respondents would release the officers and municipalities from any civil liability. Mrs. Livingstone was to submit certain bills for medical expenses and repairs to her home to Attorney Ceraso, who would forward them to Washington Township for payment. (699a-714a) Counsel discussed the terms of the proposed agreement with Mr. and Mrs. Livingstone, explaining that if they agreed to the terms,

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[1] Page numbers followed by lower case letters designate pages of the Appendices filed in the Court of Appeals for the Third Circuit.

they would be waiving all claims arising from Mrs. Livingstone's encounter with police officers. Respondents agreed to release the officers and municipalities involved from civil liability. The terms of the release/dismissal agreement were recited by Attorney Ceraso on the record, in Respondents' presence, before the judge presiding at Mrs. Livingstone's criminal trial. (Appendix 110A-115A) Then on Mr. Ceraso's motion, the court entered judgment of acquittal for Mrs. Livingstone and discharged the jury.

In their complaint instituting this suit, Respondents placed this agreement at issue (21a). All Petitioners asserted the binding effect of the agreement, in motions for summary judgment. Respondents asserted that there was no agreement that they would not pursue civil remedies. They argued that the agreement was never reduced to writing, no money changed hands (Mrs. Livingstone never submitted bills to her attorney for payment) and the agreement was never formally ratified by the municipalities. The District Court granted the motions, on the recommendation of the magistrate judge. (Appendix 99A-109A).

The Court of Appeals vacated the order granting summary judgment. The court found material issues of fact remained on the question whether Respondents made a deliberate, informed and voluntary waiver of their rights to file civil actions against Petitioners. (Appendix 79A)

On remand, Respondents sought summary judgment on the issue of the validity of the agreement. (354a) In response, Petitioners filed cross-motions for summary judgment on that issue. The District Court determined that while the voluntariness requirement of the Rumery analysis remained an issue for trial, the remaining Rumery requirements would be appropriate for summary judgment. The court found no evidence of prosecutorial overreaching. Specifically, the court cited the prosecutor's affidavit describing the circumstances of the agreement. Among other

factors, the prosecutor noted that the criminal trial had pitted members of the Livingstone family as opposing witnesses, and additional testimony would undermine the relationship that the family apparently had rebuilt in the year since the incident. He also noted that the agreement called for the payment of bills for damages the Livingstones claimed to have sustained. The District Court found no evidence that the prosecutor's motive for participating in the agreement was improper, and found that "[i]n the absence of evidence that the motivation was improper, we may accept his explanation". (Appendix at 58A)

The case proceeded to trial on the issues raised by the "voluntariness" prong of the Rumery test.[2] Petitioners offered the testimony of the officers and Attorney Ceraso. The officers acknowledged that Petitioner Monack applied a stun gun to Mrs. Livingstone's clothed leg, in an effort to subdue her; otherwise, their account of the struggle and Mrs. Livingstone's account conflicted.

Mrs. Livingstone described in detail the assault she alleged was perpetrated by Officer Monack with the help of Officer Snyder, and the injuries she sustained. She said that Officer Monack applied a stun gun to her thigh, and then "shov[ed] the stun gun up between" her legs, saying "you want a thrill, I'll give you a thrill" (Trial transcript, vol.III, p.47-100) During cross-examination of Attorney Ceraso, Respondents offered a report of an emergency room examination of Mrs. Livingstone, that Respondents suggested corroborated Mrs. Livingstone's account of her injuries. The District Court admitted the reports into evidence on counsel's proffer that

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[2] Had the jury found that no agreement was reached or that the Livingstones had not voluntarily and deliberately entered into the agreement, then the parties would have proceeded to trial on the merits of the Livingstones' federal and remaining state law claims.

the physician would be available as a witness.[3] (768-772a)

Respondents' counsel argued to the jury that the jury was required to find that all three municipalities were to benefit from and were bound by the agreement, in order to find for defendants. The District Court instructed the jury accordingly. (10b,22b) On the Rumery issue, the District Court instructed the jury that defendants/petitioners carried the burden of proving that plaintiffs/respondents agreed to release defendants from civil liability in return for the entry of judgment of acquittal in favor of plaintiff Frances Livingstone. The court instructed that defendants must prove their case by a preponderance of the evidence, described as "evidence which points to a certain conclusion and appears to you to be more credible and probable than evidence to the contrary". The court told the jury to determine whether plaintiffs reached an agreement with defendants, and whether plaintiffs made a deliberate, informed and voluntary waiver of their rights to pursue civil actions against the defendants.

The court told the jury to consider twelve factors in its evaluation of the validity of plaintiffs' waiver, including the clarity of the agreement, plaintiffs' education, the amount of time plaintiffs had to consider the terms of the alleged agreement before responding, whether plaintiffs were advised by counsel, whether plaintiffs had the opportunity to negotiate terms and conditions of the alleged agreement, and whether plaintiffs were subjected to coercion. (15b-22b)

The jury determined that Respondents had made a voluntary, deliberate and informed waiver of their rights to pursue civil actions against Petitioners.

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[3] The physician who conducted the examination was not called as a witness. The report was admitted over Petitioners' objection that the evidence was irrelevant. (770a)

The Court of Appeals vacated the judgment, and remanded for proceedings as follows:

a. The parties must brief the question whether the Livingstones had undertaken to negotiate toward a release with North Belle Vernon Borough and Fayette City Borough, or that the Livingstones merely made an offer to those two boroughs, and the court must resolve that issue.

b. The parties must address:

> whether Heneks [the prosecutor] made a determination that the Livingstones' civil rights claims were marginal or frivolous, and, if so, on what basis he did so; (2) whether Heneks knew or should have known of the foregoing evidence of police misconduct; and (3) if Heneks did know, or should have known, of that evidence, whether other facts available to Heneks in some way undercut it...[D]efendants would have to demonstrate that Heneks was aware of other evidence that rendered the foregoing evidence of police misconduct fundamentally untrustworthy.

(Appendix 27A-28A) Ultimately, the district court would have to decide whether enforcement of the agreement would be compatible with Rumery and Third Circuit precedent, "notwithstanding that the evidence of misconduct was not known, or reasonably knowable, by the prosecutor at the time the prosecutor entered into what might appear, in retrospect, to be an improvident agreement." (Appendix 28A)

c. If the court were to rule in Petitioners' favor on the foregoing issues, then the parties will proceed to retrial on the Rumery

voluntariness issue, with Petitioners obliged to prove voluntariness by clear and convincing evidence. The jury also must be instructed to determine whether Petitioners proved that the prosecutor's stated reasons for participating in the agreement were his actual reasons.

REASONS FOR GRANTING THE WRIT

A. This Court should grant certiorari because the Court of Appeals for the Third Circuit has crafted a per se rule, in conflict with Town of Newton v. Rumery, and decisions of other Circuits, that release/dismissal agreements are invalid unless the prosecutor correctly determined that the civil claims at issue were "marginal or frivolous".

Under the Court of Appeals' ruling in this case, before participating in a release/dismissal agreement, the prosecutor is obliged to evaluate the merits of the criminal defendant's allegations of civil rights violations. The prosecutor must conclude that the defendant's claim is frivolous. Furthermore, the prosecutor must be correct in his evaluation; under the Court of Appeals' holding, the prosecutor's "reasonable belief" that the claims were marginal would not suffice to establish that the release/dismissal agreement was in the public interest. The party asserting the validity of the release must prove that in fact, the criminal defendant's civil claims were marginal or frivolous. (Appendix 23A-28A).

In Town of Newton v. Rumery, 480 U.S. 386 (1987), this Court applied federal common law to determine the validity of a release of Section 1983 claims, negotiated in exchange for the dismissal of criminal charges. The Court held:

> [A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.

480 U.S. 386, 392. This Court established that a "release/dismissal" agreement is enforceable if it was

voluntary, if there is no evidence of prosecutorial misconduct, and if enforcement of the agreement would not adversely affect the relevant public interests. Id., at 396.

In this Court's view, the rights released by the criminal defendant Rumery were private rights.

> Rumery had no public duty to institute a §1983 action merely to further the public's interest in revealing police misconduct...Thus, we hesitate to elevate more diffused public interests above Rumery's considered decision that he would benefit personally from the agreement.

Id. at 394.

Simply stated, Rumery's surrender of his statutory remedy under Section 1983 did not have a significant impact on the public at large. Id., 394-395. Nor did the Court find a sufficient public interest that necessarily would be injured by the enforcement of release/dismissal agreements, to warrant the declaration of such agreements invalid per se. On the contrary, the Court believed that such agreements may further legitimate public interests. Id., at 396, 398 (O'Connor, concurring). Finally, the Court declined to presume that prosecutorial overreaching characterizes release-dismissal agreements.

In seeking to guarantee that release/dismissal agreements are free from prosecutorial overreaching, the Third Circuit has taken an approach that requires the prosecutor to discharge a responsibility that he or she may be ill-equipped to handle: the accurate evaluation of the relative merit of a civil claim. Furthermore, the Court's analysis presumes misconduct on the part of the prosecutor who participates in a release/dismissal agreement, unless the claim is marginal or frivolous. The parties asserting the validity of

the agreement must prove that the prosecutor in fact considered the marginal or frivolous nature of the civil rights claims. Furthermore, the parties must prove to the factfinder, by clear and convincing evidence, that the prosecutor "properly regarded" those claims as marginal or frivolous.

In Rumery, the Court noted, of course, that some Section 1983 claims are meritless. But the Court did not determine that Rumery's own claim was meritless, in concluding that the agreement was not the product of prosecutorial overreaching. Petitioners do not dispute that in some cases, courts may deem the potential merit of the claim to be a relevant factor in evaluating the validity of these releases. Rather, they challenge the wisdom of a per se rule, where Rumery has rejected that approach. No other Court of Appeals has found it necessary or appropriate to establish a "bright line" test to govern the evaluation of release/dismissal agreements.

Indeed, the extent of the injury apparently at issue--severe burns to the criminal defendant that he suffered while in custody--did not prevent the Fifth Circuit from concluding, under the Rumery test, that the release/dismissal agreement was enforceable. Berry v. Peterson, 887 F.2d 635 (5th Cir. 1989). In Hill v. City of Cleveland, 12 F.3d 575 (6th Cir. 1993), the court's careful analysis of the claim of prosecutorial overreaching omitted any discussion of the injury sustained by Hill or the potential merit of the civil rights claim. Rather, the court properly emphasized the timing of the criminal charges of resisting arrest and disorderly conduct, the fact that motions challenging the sufficiency of the evidence had been denied before the release was negotiated, and the fact that the release was supervised by a judge who was familiar with the charges against Hill.

The Third Circuit panel in this case relied on Cain v. Darby Borough, 7 F.3d 377 (3d Cir. 1993) (in banc), cert. denied, 114 S.Ct. 1303 (1994), for the proposition that the prosecutor must conclude that the civil claim at issue is frivolous. In Cain, the court considered the release in the context of a policy of the District Attorney's Office applicable to defendants otherwise eligible for its "Accelerative Rehabilitative Disposition" program. If the police might have faced civil liability, the District Attorney would not approve the criminal defendant's application for admission to the pre-trial "probation without verdict" program unless the defendant first executed a release-dismissal agreement. In that context, the court's articulation of a requirement that the prosecutor consider the merit of the civil claims at issue may be understood, particularly so in reaction to the prosecutor's efforts to defend the policy:

> The District Attorney rationalizes his policy on the ground that he and the police have an interest in avoiding "the needless litigation, the ofttimes frivolous actions that are brought and to resolve the entire matter at the time of the ARD hearing in an amicable fashion.

Id., at 383. The Court of Appeals' application of the Cain principle under the circumstances of this case, however, when coupled with its new declaration of the burden of proof, effectively renders release/dismissal agreements unenforceable in the Third Circuit.

B. **The Court of Appeals' resolution of an issue of first impression among the Courts of Appeal, that Petitioners must prove the validity of the release/dismissal agreement by clear and convincing evidence, conflicts with this Court's precedent.**

In Rumery, this Court did not have occasion to address the question of the burden of proof of the party seeking to enforce a release/dismissal agreement. The other Courts of Appeals have not squarely addressed the issue. The Third Circuit's holding appears to be in conflict, however, with this Court's precedent on the burden of proof to be applied in civil cases.

The Court of Appeals acknowledged this Court's precedent.

> [I]n civil actions between private litigants, a standard of proof greater than one of a preponderance of the evidence will only apply in cases in which "'particularly important individual interests or rights are at stake.'" Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 389-90 (1983)].

(Appendix 33A). The Court of Appeals determined, however, that the enforcement of "oral" release-dismissal agreements implicates "important individual interests or rights"; Id.[4]

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[4] The Court's characterization of the agreement as an "oral" agreement fails to reflect that the terms of the agreement were declared on the record by counsel for the criminal defendant, in the presence of Respondents and the judge presiding at the criminal trial.

The "particularly important individual interests or rights" of which this Court spoke in Grogan and Huddleston included proceedings to terminate parental rights[5],

involuntary commitment proceedings[6]; and deportation proceedings[7].

> By contrast, imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence. See, e.g., United States v. Regan, 232 U.S. 37, 48-49, 34 S.Ct. 213, 217, 58 L.Ed. 494 (1914) (proof by a preponderance of the evidence suffices in civil suits involving proof of acts that expose a party to a criminal prosecution).

Grogan, 103 S.Ct. at 690.

In a section 1983 suit, the plaintiff pursues a statutory remedy for alleged violations of his constitutional rights. This Court recognized in Rumery, of course, that the "vindication of constitutional rights and the exposure of official misconduct" are concerns implicated by Section 1983 suits; 480 U.S. at 395. In criminal prosecutions, however, where the State claims the defendant waived constitutional rights, the State's burden of proof on the issue is "proof by a preponderance of the evidence." Colorado v. Connelly, 479 U.S. 157, 169 (1986).

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[5] Santosky v. Kramer, 455 U.S. 745 (1982).

[6] Addington v. Texas, 441 U.S. 418 (1979).

[7] Woodby v. INS, 385 U.S. 276 (1966).

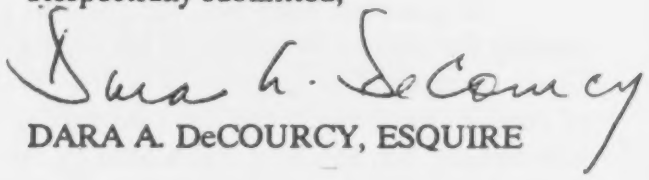
Despite the fact that the statutory remedy serves as a means for the "vindication of constitutional rights", the action remains a private party's civil suit for money damages. Furthermore, a Section 1983 suit affords but one of many vehicles under federal and state law for the discovery, remedy and deterrence of official misconduct.

The Court of Appeals' declaration on this issue of first impression merits this Honorable Court's review. Furthermore, the circumstances of this case would support enforcement of the agreement for the voluntariness of the agreement alone. Rumery, 480 U.S. at 398 n.10.

CONCLUSION

Petitioners respectfully request that this Court grant the petition.

Respectfully submitted,



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